

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**ON APPEAL FROM THE COURT OF APPEALS
H.N. White, P.J., B.K. Zahra, K.T. Wilder, JJ.**

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

vs

No. 120205

**\$1,923,525.65
Defendant-Appellee**

**Lower Court No: 97-002514CF
COA NO.218153**

**BRIEF OF THE WAYNE COUNTY PROSECUTOR'S OFFICE,
AS AMICUS CURIAE
IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

**Michael E. Duggan
Prosecuting Attorney
County of Wayne**

**Timothy A. Baughman
Chief, Research, Training
and Appeals
1441 St. Antoine
Detroit, MI 48226
313 883-3475**



Table of Contents

	<u>Page</u>
Index of authorities	-ii-
Statement of the Question	-iii-
Statement of Facts	-iii-
Argument	-1-
I. There is no exemption from forfeiture for attorney fees under the controlled substances forfeiture provisions. Attorney fees are exempt from forfeiture in an action brought under the Criminal Enterprise Act. That exemption should be read as applying only to fees already paid; further, funds exempt from forfeiture under one statutory scheme but not another are not protected.	-1-
Introduction	-1-
A. The Statutes	-2-
B. Discussion	-5-
C. Conclusion	-8-
Relief	-9-

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Gilbert, 198 F.3d 1293 (11th Cir.1999)	1
--	---

STATE CASES

Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich. 75 (1991)	1
In re Forfeiture of \$1,923,235, 247 Mich. App. 547 (2001)	6
Hoste v. Shanty Creek Management, Inc., 459 Mich. 561 (1999)	2
People v Carpentier, 446 Mich. 19 (1994)	1
Pohutski v. City of Allen Park, 465 Mich. 675 (2002)	2
Robertson v. Daimler Chrysler Corp., 465 Mich. 732 (2002).	1, 2
State Treasurer v. Schuster, 456 Mich. 408 (1998)	2

STATUTES

MCL 750.159m	2
MCL 750.159v	5
MCL 750.159g	7
MCL 333.7521	3

Statement of the Question

I.

There is no exemption from forfeiture for attorney fees under the controlled substances forfeiture provisions. Attorney fees are exempt from forfeiture in an action brought under the Criminal Enterprise Act. Should that exemption should be read as applying only to fees already paid;¹ further, should funds exempt from forfeiture under one statutory scheme but not another be reachable?

Amicus answers: "YES"

Statement of Facts

Amicus joins in the Statement of Facts by the appellant, the People of the State of Michigan.

¹ Amicus leaves this point to the People of the State of Michigan's fine brief on the issue.

Argument

I.

There is no exemption from forfeiture for attorney fees under the controlled substances forfeiture provisions. Attorney fees are exempt from forfeiture in an action brought under the Criminal Enterprise Act. That exemption should be read as applying only to fees already paid;¹ further, funds exempt from forfeiture under one statutory scheme but not another are not protected.

Introduction

Involved here is a question of statutory interpretation, reviewed de novo.² The task of a court reviewing the meaning of a statute has been emphasized in recent decisions of this Court:

- The court's task is to determine the intent of the legislature.³
- When interpreting statutory language, the court's obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.⁴
- When parsing a statute, the court must presume every word is used for a purpose. As far as possible, the court must give

¹ Amicus leaves this point to the People of the State of Michigan's fine brief on the issue.

² *People v Carpentier*, 446 Mich 19 (1994); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80 (1991).

³ *Robertson v. Daimler Chrysler Corp.*, 465 Mich. 732, 748 (2002).

⁴ *Robertson v. Daimler Chrysler Corp.*, supra. See *United States v. Gilbert*, 198 F.3d 1293, 1298 (11th Cir.1999) ("We begin our construction of the Hyde Amendment where courts should always begin the process of legislative interpretation, with the words of the statutory provision themselves.")

effect to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.⁵

- Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory.⁶
- Statutes that relate to the same subject matter or share a common purpose are in pari material and must be read together.⁷

A. The Statutes

MCL 750.159m provides that, with exceptions to be noted later in the section, "all real, personal, or intangible property of a person convicted of a violation of section 159i that is the proceeds of racketeering, the substituted proceeds of racketeering, or an instrumentality of racketeering, is subject to civil in rem forfeiture to a local unit of government or the state" There are exceptions to forfeiture:

- Real property that is the primary residence of the spouse of the owner is not subject to civil in rem forfeiture ...unless that spouse had prior actual knowledge of, and consented to and participated in the commission of, the racketeering activity.
- Real property that is the primary residence of a dependent minor child of the owner is not subject to civil in rem forfeiture.

⁵ *Pohutski v. City of Allen Park*, 465 Mich. 675, 684 (2002)

⁶ *Hoste v. Shanty Creek Management, Inc.*, 459 Mich. 561, 574 (1999); *Robertson v. Daimler Chrysler Corp.*, *supra*;

⁷ *State Treasurer v. Schuster*, 456 Mich 408, 417 (1998).

- Property is not subject to civil in rem forfeiture if either of the following circumstances exists:
 - (a) The owner of the property did not have prior actual knowledge of the commission of the racketeering activity.
 - (b) The owner of the property served notice of the commission of the crime upon an appropriate law enforcement agency.
- The civil in rem forfeiture of property encumbered by a security interest is subject to the interest of the holder of the security interest who did not have prior actual knowledge of the racketeering activity.
- The civil in rem forfeiture of property encumbered by an unpaid balance on a land contract is subject to the interest of the land contract vendor who did not have prior actual knowledge of the racketeering activity.
- Reasonable attorney fees for representation in an action under this chapter are not subject to civil in rem forfeiture *under this chapter*.⁸

MCL 333.7521 provides for very broad forfeiture, including not only controlled substances and analogue controlled substances themselves, but raw materials for the manufacturing of these items; property that is used, or intended for use, as a container these substances; conveyances, including aircraft, vehicles, and vessels used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt these items; any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, an androgenic anabolic steroid, a counterfeit androgenic anabolic steroid, or other illegal drug that is traceable to an exchange for a these substances, or that is used or intended to be used to

⁸ Emphasis supplied.

facilitate any violation of these statute, including, but not limited to, money, negotiable instruments, or securities. Any money that is found in close proximity to any property that is subject to forfeiture is presumed to be subject to forfeiture, a presumption that may be rebutted by clear and convincing evidence.

Exceptions to forfeiture are also delineated:

- A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this article.
- A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent.
- A conveyance is not subject to forfeiture for a violation of section 7403(2)(c) or (d), section 7404, or section 7341(4).
- A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission.
- To the extent of the interest of an owner, a thing of value is not subject to forfeiture by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent.

Absent from this forfeiture scheme, then, is an exception for attorney fees; the Criminal Enterprise Act provides an exception for attorney fees only in an action "*under this chapter.*" Not only is it quite possible for property to be subject to forfeiture both under the Controlled

Substances Act and the Criminal Enterprise Act, but the Criminal Enterprise Act expressly provides at MCL 750.159v that its provisions do not preclude a forfeiture proceeding "under any other law of this state."

B. Discussion

Actions under both the Criminal Enterprise Act and the Controlled Substances Act were brought. Property otherwise subject to forfeiture under the Criminal Enterprise Act may not be forfeited *in an action under the Act* where used for reasonable attorney fees. Even if one accepts the holding of the Court of Appeals that this provision applies to future fees and not fees paid at the time of the action—something the People and amicus contest—the fact remains that this *same* property is subject to forfeiture under the Controlled Substances provisions, a separate and distinct act from the Criminal Enterprise Act. The Criminal Enterprise Act only exempts attorney fees from forfeiture in a proceeding brought under the Act, and expressly provides that the terms of the Act do not preclude forfeiture under "any other law" of this state. Because the money which is the subject of dispute in this case is exempt only from forfeiture "*in an action*" brought under that Act, the exemption says absolutely nothing about the forfeiture of the money under the Controlled Substances Act, where it is *not* exempt from forfeiture.

The Court of Appeals, though purporting simply to apply the "plain language" of the statutes, failed to do so. In truth, that court made a policy judgment unconnected to the text of the statutes, taken together. The panel says that "[p]recluding claimaints from obtaining

funds equal to claimants' reasonable attorney fees for representation under the criminal enterprises act would be contrary to the plain language of the criminal enterprises act."⁹ But this is not so. The Act does *not* prohibit *any* action that might "preclude claimants from obtaining funds equal to claimant's reasonable attorney fees for representation under the criminal enterprises act"; it precludes forfeiture *by way of the forfeiture provisions of the Act* (attorney fees are not subject to forfeiture "under this chapter"). The panel's formulation is not the plain language of the Act, but a rewriting of it. The plain language of the Act is that forfeiture of attorney fees—however they are defined, whether as those already paid or as including future fees—is not permitted *under the Act*, and that forfeiture actions under other provisions of law are not precluded. The Controlled Substances Act then operates to forfeit these funds in this case, an action having been brought under *that* Chapter, which has no attorney fee exemption.

The Court of Appeals appears to have been led to its conclusion by its view that to allow forfeiture under the Controlled Substances Act of funds not subject to forfeiture under the Criminal Enterprises Act would render the exemption in the Criminal Enterprises Act nugatory.¹⁰ This is a legitimate concern, but the point is not well-taken in this case, for the exemption in the Criminal Enterprises Act would only be rendered nugatory if *every* Criminal Enterprises forfeiture was also subject to the provisions of the Controlled

⁹ *In re Forfeiture of \$1,923,235*, 247 Mich App 547, 553 (2001).

¹⁰ 247 Mich App at 553.

Substances forfeiture statutes. But this is not so. One can be guilty of violation of the Criminal Enterprises Act, and subject to its forfeiture provisions, in any number of ways that would not involve controlled substances at all.¹¹ As just one of many possible examples, one may commit the offense of racketeering by committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit an offense for financial gain involving a violation of section 4, 5, or 7 of the medicaid false claim act, 1977 PA 72, MCL 400.604, 400.605, and 400.607, concerning medicaid fraud.

The exemption in the Criminal Enterprises Act regarding attorney fees is thus not rendered nugatory by reading the text to say what it says—that the exemption applies only in actions brought under the Act—for in approximately 35 described circumstances in the Act the exemption will be effective. And the exemption applies even in cases where the triggering mechanism for the Act is a controlled substances violation—attorney fees are not subject to forfeiture in an action under the Act, but, under the plain language of the Act, are subject to forfeiture under any *other* law of the State that might apply, and the Controlled Substances Act applies, while there is not another forfeiture provision for other violations of the Criminal Enterprise Act. What is rendered nugatory by the Court of Appeals reading is not the exemption for attorney fees, but its provision that it does not prohibit forfeiture under any other law of the State, as well as its language that the exemption applies to actions under the Act (not under some other Act).

¹¹ See MCL 750.159g (i)(a) through (ll), defining racketeering, and in ways not necessarily involving controlled substances at all.

C. Conclusion

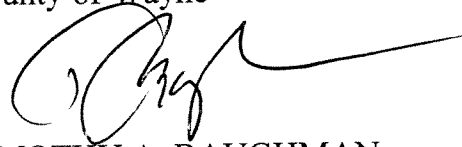
The Court of Appeals erred by misreading the statute to preclude operation of *another* law of this State to reach the funds here at issue, even if that money was not reachable under the Criminal Enterprises Act. This Court should hold that all provisions, and every phrase, of the Criminal Enterprise Act, must be given meaning, so that the exemption for attorney fees is limited to actions brought under the Criminal Enterprise Act, and *all* proceeds are reachable under the Controlled Substances Act, which reaches them, and is another "law of this State," application of which is expressly authorized in the Criminal Enterprise Act itself.

Relief

Wherefore, amicus requests that the Court of Appeals be reversed and the order of the Circuit Court reinstated..

Respectfully submitted,

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

A handwritten signature in black ink, appearing to read 'Timothy A. Baughman', with a long horizontal flourish extending to the right.

TIMOTHY A. BAUGHMAN
Chief of Research, Training,
And Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792